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No. 83-2107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JUDITH LYNNE MADRID,

PETITIONER,

V.

LAWYERS TITLE INSURANCE CORP.,
AND DONALD TURNEY,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ADDITIONAL QUESTIONS PRESENTED FOR REVIEW

1. Is the non-judicial foreclosure of a Deed of Trust a transfer within the meaning of 11 U.S.C.§101(41) and 11 U.S.C. §548(d)(1)?

2. Is the non-judicial foreclosure of a Deed of Trust a transfer made by the debtor and is the value paid at such sale in exchange for such transfer received by the debtor under the provisions of 11 U.S.C.§548(a)(1) and §548(a)(2)(A)?

3. Is the price paid at a non-collusive, public, non-judicial Trust Deed foreclosure sale itself the "reasonably equivalent value" of the property transferred under the provisions of 11 U.S.C. §548(a)(2)(A)?

4. If the non-judicial foreclosure of a Deed of Trust is a transfer within the meaning of 11 U.S.C. §101(41) and 11 U.S.C. §548(d)(1) and the price paid at such sale does not itself define "reasonably equivalent value", then what standards should be used to determine "reasonably equivalent value".

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RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondent, Lawyers Title Insurance Corporation, submits this Response to Petition for Writ of Certiorari on behalf of itself and Donald

Turney for the purpose of joining in the request of Petitioner, Judith Lynn Madrid, for review of the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 13, 1984, and for the further purpose of presenting additional questions for review.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals, reported at 725 F.2d 1197 (9th Cir. 1984), the Opinion of the Bankruptcy Appellate Panel from which appeal was taken to the Ninth Circuit Court of Appeals, reported at 21 B.R. 424 (B.A.P. 9th Cir. 1982), and the Bankruptcy Court Opinion from which appeal was taken to the Bankruptcy Appellate Panels of the

Ninth Circuit, reported at 10 B.R. 796 (BK D. Nev. 1981), are set forth in full at pages A-1, A-34 and A-58, respectively, in the Appendices to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by Judith Lynn Madrid, Petitioner, which Appendices are incorporated by reference into Respondent's Response to Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered February 13, 1984. Petitioner's initial Petition for Writ of Certiorari was served upon Respondent on May 11, 1984. That Petition for Writ of Certiorari was returned undocketed to Petitioner by the office of

the Clerk of the Supreme Court on May 14, 1984 for improper form. A revised Petition for Writ of Certiorari was docketed by the Clerk's office on June 25, 1984. The undersigned counsel for Respondent was informed by the Clerk's office that Lawyers Title Insurance Corporation's response was due on July 27, 1984.

On July 27, 1984, Respondent submitted its Answer and Cross-Petition for Writ of Certiorari. Respondent's Answer and Cross-Petition was not filed for the reason that pursuant to Supreme Court Rule 19.5, the Response was improperly joined with the Cross-Petition. Respondent now submits this Response to Petition for Certiorari for review. This

Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 11 U.S.C. §548, quoted in Appendix "A" hereto, requiring that the debtor make the transfer, §548 (a); establishing the "reasonably equivalent value" requirement, §548 (a)(2)(A); and specifying the criteria when a transfer shall be deemed to have been made, §548(d)(1). Also involved is the statutory provision contained in 11 U.S.C.§101(41) quoted in Appendix "B" hereto, defining "transfer" under the Act. This case arose under the Bankruptcy Reform Act of 1978, Public Law 95-598 (H.R. 8200); November 6, 1978.

STATEMENT OF THE CASE

Respondent does not disagree with the statement of the nature of the case set forth in Judith Lynn Madrid's Petition for Writ of Certiorari at pages 10 and 11 and therefore incorporates the same into this Response to Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Stability in the law of secured transactions is of extreme importance in the business, banking, and real estate arena not only on the local and state level but on a national basis as well. Deeds of trust, security agreements and other instruments utilized to collateralize a business transaction must be certain in their consequence subsequent to enforcement if the collateral is to do

what it is intended to do, that is, be used to satisfy the obligation or indebtedness thereby secured. That is not to say, however, that a foreclosure or collateral forfeiture proceeding should not be held in abeyance or stayed pending an attempt at reorganization. Postponement of foreclosure or collateral forfeiture has long been held constitutional so long as safeguards are provided to protect the rights of secured creditors throughout the reorganization proceeding to the extent of the value of their interest in the property. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway, 294 U.S. 648, 55 S.Ct. 595, 79 L.ed. 1110 (1935). Wright v. Union

Central Life Insurance Co., 311 U.S. 273, 61 S.Ct. 196, 85 L.ed. 184(1940). However, the issue raised in this case does not concern the constitutionality or effect of staying a foreclosure or collateral forfeiture proceeding prior to its consummation, but rather whether or not the foreclosure or collateral forfeiture proceeding may be reviewed post-sale or forfeiture by a bankruptcy court to determine whether or not sufficient consideration ("reasonably equivalent value", 11 U.S.C. §548(a)(2)(A)) was paid at the foreclosure sale or collateral forfeiture proceeding.

Application of the fraudulent transfer provisions of the bankruptcy laws first arose in the case of Durrett v.

Washington National Ins. Co., 621 F.2d 201 (1980), Appendix "C" hereto. There the Fifth Circuit Court of Appeals cast doubt to the finality of trust deed foreclosure sales by holding that the foreclosure sale itself was a transfer within the purview of Section 67(d) of the former Bankruptcy Act [11 U.S.C. §107(d)]. Having determined that a transfer had occurred the Fifth Circuit Court of Appeals then reviewed the foreclosure sale to determine whether a "fair" consideration and a "fair equivalent" value had been paid by the secured party within the meaning of §67(d)(1),(e)(1) of the Act, 11 U.S.C. §107(d)(1),(e)(1). Although the secured party's bid at the non-judicial foreclosure sale was the exact amount

necessary to fully satisfy the indebtedness secured by the Deed of Trust, the Fifth Circuit Court of Appeals determined that the bid amount was but 57.7% of the fair market value of the property and as such the sales price was not a "fair equivalent" for the property. The sale was declared voidable under §67(d) and the debtor-in-possession, Durrett, was restored with title to the property.

Although decided under the provisions of the former Bankruptcy Act (the Bankruptcy Statute of 1898, as amended) the Durrett case, supra, quickly became authority upon which bankruptcy courts throughout the United States relied in interpreting the fraudulent transfer

provisions of the Bankruptcy Reform Act of 1978, (§67(d) of the former Bankruptcy Act being substantially the same as the provisions contained in §548 of the Bankruptcy Reform Act of 1978). A list of the Bankruptcy Court cases which have followed the reasoning of the Fifth Circuit Court of Appeals in the Durrett case, supra, under §548 of the Bankruptcy Reform Act of 1978 are set forth at pages 23 and 24 of Judith Lynn Madrid's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The trial court decision in this case, cited at 10 B.R. 796 (BKD Nev. 1981) (Petitioner's Appendices page A-58) also adopted the reasoning of the Fifth Circuit Court of Appeals in its ruling in favor of

Judith Lynn Madrid. However, on appeal to the United States Bankruptcy Appellate Panel for the Ninth Circuit the lower court holding was reversed, the Bankruptcy Appellate Panel holding that the price obtained at a non-collusive and regularly conducted trust deed foreclosure sale is itself the "reasonably equivalent value" of the property transferred. On further appeal, the United States Court of Appeals for the Ninth Circuit affirmed the Bankruptcy Appellate Panel in its reversal of the lower court opinion on the grounds that the non-judicial foreclosure sale was not a transfer within the meaning of 11 U.S.C. §548 and 11 U.S.C. §101(41).

Thus, there exists an absolute conflict in the Federal Circuits on the

application of 11 U.S.C. §548 to foreclosures of perfected deed of trust security interests. On the one hand is the holding of the Fifth Circuit Court of Appeals, which has been followed in numerous other circuits, that a non-judicial trust deed foreclosure sale is a transfer within the meaning of 11 U.S.C. §548 and §101(41) and that the price paid at the non-judicial foreclosure sale should be scrutinized for "reasonably equivalent value". On the other hand, the Ninth Circuit has rejected the reasoning of the Fifth Circuit Court of Appeals in holding that the price paid at a non-collusive, regularly conducted non-judicial trust deed foreclosure sale is itself the reasonably equivalent value

and that further the foreclosure sale itself does not constitute a transfer within the meaning of 11 U.S.C. §548 and §101(41). No better example of the divergence of opinion in the application of the bankruptcy fraudulent transfer provisions can be found than in the Fifth Circuit itself in the case of Abramson v. Lakewood Bank & Trust, 642 F.2d 547 (1981), Appendix "D" hereto. There, the majority of the Court followed the reasoning previously set forth in the Durrett case, supra. However, Judge Clark in his dissent at 647 F.2d at page 549, disagreed with the reasoning of the majority and concluded that a foreclosure sale is not a transfer intended to be subject to the fraudulent transfer

provisions of the Bankruptcy Act. This reasoning was later adopted by the Ninth Circuit Court of Appeals.

Another excellent illustration of the dichotomy of opinion on the issues involved in this case can be found in two recent articles appearing in the "Business Lawyer Journal" each reaching the opposite conclusion. The first article is entitled "Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the Durrett Problem", 38 Bus. Law. 1605 (1983), wherein Messrs. Alden, Gross and Borowitz conclude that foreclosure sales should be treated as a transfer under §548 of the Bankruptcy Code subject to scrutiny at the time of the sale to determine whether or not that sale obtained the

reasonably equivalent value of the property foreclosed. The more recent article taking the opposite position is entitled "Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits", 39 Bus. Law. 977 (May, 1984), wherein Messrs. Zinman, Houle and Weiss conclude that the Durrett rule is incorrect and that the Ninth Circuit reached the correct conclusion in its Bankruptcy Appellate Opinion and Ninth Circuit Court of Appeals' Opinions in this case below.

Lawyers Title Insurance Corporation is not, in this Response to Petition for Writ of Certiorari, attempting to fully argue the merits of its case and the many reasons why the Ninth Circuit Court of

Appeals should be affirmed by this Court if the Petition for Writ of Certiorari is granted and this appeal proceeds for briefing and argument. Many of the arguments in support of the Fifth Circuit Court of Appeals as evidenced in the Durrett case, supra, and many of the counter-arguments in support of the Ninth Circuit Court of Appeals in its decision in this case below, supra can be reviewed by a reading of the case authorities cited in Petitioner's and Respondent's briefs and respective appendices, together with a review of the Business Lawyer Journals articles referred to above.

Recent amendments to the United States Bankruptcy Code may also have an effect upon whether or not Certiorari is

granted in this case. While the attorneys for Respondent have not yet received a final copy of the Bankruptcy Amendments and Federal Judgeship Act of 1984 as signed into law by President Reagan on Wednesday, July 11, 1984, Congress Report No. 98 sets forth the amendments which the undersigned attorneys for Respondent are informed and believe remained intact with the final enactment.

Section 421(i) states as follows:

> "Section 101(44) of Title 11 of the United States Code, as so redesignated, is amended by striking out the period and inserting in lieu thereof 'and foreclosure of the debtor's equity of redemption; and'."

11 U.S.C. §101(41), Appendix B hereto, was redesignated as §101(44) in the amendments. 11 U.S.C. §548(a) was

also amended in §463 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 as follows:

> "§463. (a) Section 548(a) of Title 11 of the United States Code is amended --(1) by striking out 'if the debtor' and inserting in lieu thereof 'if the debtor voluntarily or involuntarily';"

Under the provisions of §553(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the amendments to §101(41) and §548(a) become effective ninety days after the date of enactment of the Act.

By amending the definition of "transfer" to include "foreclosures of debtor's equity of redemption" Congress would appear to have legislatively adopted the Fifth Circuit Court of Appeals

reasoning in the Durrett case, supra. However, Respondent submits that because of the present volatility of the Bankruptcy Laws and the potential that the recent amendments may be further amended, that the transfer issue raised in this case be reviewed by this Court notwithstanding the Bankruptcy Amendments and Federal Judgeship Act of 1984. Further, there exists under the state law of the State of Nevada no equity or right of redemption in foreclosure sales under trustee's power of sale in a deed of trust. Nevada Revised Statute §107.080 entitled,

> "Trustee's Power of Sale: Notice of Default and Election to Sell; Deficiency in Performance, Payment; Place of Sale; No Equity, Right of Redemption; Shares of Cooperative Housing Corporation"

states at subsection 5 thereof:

> "Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser of the title of the grantor without equity or right of redemption. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease." (Emphasis added)

Thus, while Congress has added to the definition of transfer the foreclosure of a debtor's equity of redemption, under Nevada State law the debtor's equity of redemption does not exist. Therefore, as pertains at least to the State of Nevada the recent amendments to the Bankruptcy Act would have no application.

Furthermore, Respondent has presented three additional questions for review in

its Response to Petition for Writ of Certiorari concerning the provisions of 11 U.S.C §548(a)(2)(A), which require as an element of fraudulent transfer that "less than a reasonably equivalent value" be received. These questions certainly remain ripe for review and are particularly important in light of the recent amendments to the transfer definitions. Section 548(a)(2)(A) was not amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 and therefore no legislative intent can be implied to modify the law existing under that subsection. In this case the Bankruptcy Appellate Panel held that the price paid at a non-collusive legitimately conducted foreclosure defines the

reasonably equivalent value. That question remains ripe for review and should be reviewed by this Court. Even if this Court disagrees with the Bankruptcy Appellate Panel conclusion, this Court should delineate the standards to be utilized by Bankruptcy Courts in making a determination of "reasonably equivalent value".

CONCLUSION

Judicial interpretation of 11 U.S.C. §548, Fraudulent Transfers, and its application to legitimate non-collusive foreclosure sales has resulted in a direct conflict between the circuits. Presently, a secured business transaction in the Ninth Circuit can be foreclosed without concern of challenge in a bankruptcy

proceeding from the obligor or the obligor's trustee. Conversely, in other circuits, specifically the Fifth Circuit, the foreclosure of the identical transaction could be challenged upon foreclosure as a transfer subject to scrutiny by a bankruptcy court for a reasonably equivalent value determination. This is a classic situation of Federal law being interpreted at two opposite ends of the spectrum in different circuits and one which is ripe for review by the Supreme Court. Lenders, title insurance companies, real estate brokers and others who deal in, insure or handle the making and foreclosure of secured transactions need a final answer to this most important issue. This Court is asked to bring

uniformity in the application of §548 of the Bankruptcy Reform Act of 1978 between the Circuits and in this appeal stabilize the law of secured transactions on a national level by rejecting the reasoning of the Fifth Circuit Court of Appeals in the Durrett and Abramson cases, supra, and affirming the holdings of the Bankruptcy Appellate Panel of the Ninth Circuit and the Ninth Circuit Court of Appeals in the Madrid case, supra.

The questions raised in this case have far reaching effects on all business transactions in which security collateral is held. It affects untold millions of dollars in business transactions each day. This Court is respectfully requested to grant the Writ of Certiorari and, at the

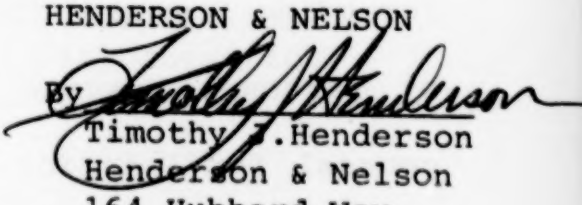
least, rule on the questions raised in this matter concerning the reasonably equivalent value issues so that title companies, banks, home sellers and others involved in the day-to-day activities of lending and security instruments will not continue to wallow in the confusion emanating from the Durrett decision, supra.

This Court as the final expositor of federal law has a duty to bring finality and uniformity to important questions of federal law, particularly where opposite conclusions have been reached in the Circuit Courts. This is especially true with significant issues of federal specialties, such as bankruptcy. Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92

L.ed.476 (1948). Each of the above elements are present in this case. Certiorari should be granted and the issues raised in Petitioner's and Respondent's Briefs reviewed in full.

Respectfully submitted this 15th day of August, 1984.

HENDERSON & NELSON

By 
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CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, Lawyers Title Insurance Corporation, a member of the Bar of the Supreme Court of the United States, certifies that counsel for Petitioner has been served with three copies of the foregoing Response for Writ of Certiorari, by personal service of the document to counsel for Petition at his address, 832 Willow Street, Reno, Nevada,

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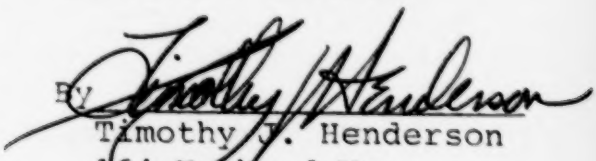
All parties required to be served have been served.

DATED this 15th day of August, 1984.

HENDERSON & NELSON

BY 

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APPENDIX A

BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. §548

§548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor--

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the

debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or

obligee of such a transfer or obligation that takes for value and in good faith has a lien on any interest transferred, may retain any lien transferred, or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so

perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; and

(B) a commodity broker or forward contract merchant that receives a margin payment, as defined in section 761(15) of this title, takes for value.

APPENDIX B

11 U.S.C. §101

§101. Definitions

In this title--

(41) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

APPENDIX C

J.W. DURRETT, SR., Plaintiff-Appellant,

v.

THE WASHINGTON NATIONAL INSURANCE CO., et al.

Defendants-Appellees.

No. 78-3351.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

July 11, 1980.

Debtor in possession under Chapter XI of Bankruptcy Act sought to set aside and vacate an alleged transfer of real property effectuated nine days prior to filing of petition for arrangement, charging that transfer was voidable. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., 460 F. Supp. 52, denied

relief, and appeal was taken. The Court of Appeals, Orma R. Smith, District Judge, sitting by designation, held that: (1) payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers, and (2) transfer accomplished by trustee pursuant to power of sale provision of deed of trust was a "transfer made" by debtor in possession within contemplation of section of Bankruptcy Act governing fraudulent transfer.

Judgment vacated; remanded with directions.

1. Bankruptcy 181

Payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers. Bankruptcy Act, §67(d)(1),(e)(1), 11 U.S.C.A. §107(d)(1),(e)(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy 958

Transfer of title to real property of debtor in possession pursuant to arrangement under Chapter XI of Bankruptcy Act, by trustee on

foreclosure of deed of trust, to purchaser at sale constituted a "transfer made" by debtor in possession within purview of section of Bankruptcy Act governing fraudulent transfers. Bankr. Act, §67(d), 11 U.S.C.A. §107(d).

See publication Words and Phrases for other judicial constructions and definitions.

Philip I. Palmer,Jr., Dallas, Tex., for plaintiff-appellant.

Larry G. Alexander, Edith DeBusk, Dallas, Tex., for Jack Mitchell.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and SMITH*, District Judge.

ORMA R. SMITH, District Judge:

This appeal concerns an action instituted in the United States District Court for the Northern District of Texas, wherein plaintiff Jack W. Durrett, Sr. (herein "Durrett"), acting as debtor in possession under Chapter XI of the Bankruptcy Act,[1] 11 U.S.C. §§701, et seq., seeks to set aside and vacate an alleged transfer of real property effectuated nine days prior to the filing of a Petition for

---

* District Judge of the Northern District of Mississippi, sitting by designation.

1. The sale of the property under attack here, occurred January 4, 1977. Plaintiff filed a Petition for Arrangement

an Arrangement under Chapter XI. Durrett charges that the transfer is voidable

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Under Chapter XI of the Bankruptcy Act on January 13, 1977). Section 403(a) of Pub.L. No. 95-598, Title 1 (Nov. 6, 1978), 92 Stat. 2549; provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Because the acts giving rise to this litigation occurred before the effective date of the new bankruptcy act, Pub. L. 95-598, the rights of the litigants are governed by "Repealed Title 11". When reference is made herein to the "Act" or the "Bankruptcy Act" the same shall refer to "Repealed Title 11".

under section 67(d) of the Act, 11 U.S.C. §107(d)[2]. The district court held that

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2. Section 67(d) of the Act provides in pertinent part:

> (1) For the purposes of, and exclusively applicable to, this subdivision: . . .(e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred . . . .
>
> (2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent;. . .
>
> (6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under

the non-judicial sale involved in the litigation constituted a transfer within the meaning of section 67(d). However, the court determined that the amount paid by the purchaser at the sale conducted by a trustee in the foreclosure of a deed of trust executed by Durrett, the indebtedness which it secured being then in default, was a "fair" consideration and

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> this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value:. . .
>
> And provided further, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. . . (Emphasis in original).

a "fair equivalent" within the meaning of section 67(d)(1), (e)(1) of the Act, 11 U.S.C. §107(d)(1), (e)(1). The court denied the relief sought by Durrett and he appeals. We reverse.

A review of the record on appeal reflects the following facts. On April 7, 1969, Durrett executed a note in the amount of $180,000.00 in favor of Southern Trust and Mortgage Company (hereafter "Southern"). The note was secured by a deed of trust upon the subject real property. Southern, on April 7, 1969, assigned the trust deed and note to defendant, The Washington National Insurance Company (hereafter "Washington"). Defendant J.H. Fields, Jr. (hereafter "Fields"), was named as the

trustee in the deed of trust. The deed of trust contained a provision for a public sale of the real property thereby conveyed, in case of default in payment of the indebtedness.

On December 13, 1976, Fields, in his capacity of trustee, posted the property for foreclosure sale. The sale was held on January 4, 1977. Defendant Shannon Mitchell, Sr. (hereafter "Mitchell"), appeared at the sale and bid the sum of $115,400.00 for the property. This was the only bid received by the trustee at the sale. The amount of the bid was the exact amount necessary to liquidate the indebtedness secured by the deed of trust. Upon receipt of the bid price, Fields executed and delivered to Mitchell a

trustee's deed to the property. The parties agree that Mitchell did not have any actual fraudulent intent when making the purchase. He responded to the notice of sale and became the successful bidder. Mitchell and Durrett are the only parties now interested in the case.

Durrett contends that the transfer of the property, pursuant to foreclosure of the deed of trust, is voidable under the provision of section 67(d).

The district court dismissed the complaint after a non-jury trial. In its findings of fact, the court held that the fair market value of the property on January 4, 1977, the date of the foreclosure sale, was the sum of $200,000.00

The parties do not take issue with this finding. Both agree that it is not clearly erroneous. See, Rule 52(a), Fed. R.Civ.P.; Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 377 (5th Cir. 1977).

Durrett asserts, on appeal, only one assignment of error, i.e., "Is $115,400.00 payment for an asset worth $200,000.00, a 'fair equivalent'".

In consideration of the issue of "fair equivalent", we should determine by what standard we are to judge the district court's conclusion of law that the amount paid for the property, $115,400.00, is "fair" consideration and a "fair

equivalent" within the meaning of section 67(d)(1),(e)(1).[3]

We have held that our review of conclusions of law by the district court in non-jury cases is not restricted by the "clearly erroneous" rule and will be reversed if incorrect. See Ealy v. Littlejohn, 569 F.2d 219, 229 n. 31 (5th Cir. 1978). See also, Buchanan v. United States Postal Service, 508 F.2d 259, 267 n. 24 (5th Cir. 1975).

The question with which we are confronted is whether the district court's conclusion of law on the "fair equivalent"

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3. The district court's conclusion of law refers to Mitchell's payment as being the sum of $115,000.00. The findings of fact, however, stated the payment to be $115,400.00. The record reflects the latter to be the correct bid price.

issue is incorrect, when considered in light of the record made in the district court and the applicable case law.

[1] The parties have cited a number of cases which deal with this issue. A great percentage of these, however, involve factual situations quite different from the facts which exist in this appeal. Here, there is involved only one event, i.e., one parcel of real estate sold at a foreclosure sale for a price which is approximately 57.7 percent of the fair market value of the property. Is the price paid a "fair equivalent" for the transfer of the property? We hold that it is not.

The sale of real property was involved in one of the cases cited by

Durrett, Schafer v. Hammond, 456 F.2d 15 (10th Cir. 1972). There the Tenth Circuit affirmed a holding by the district court that a sale of real property for approximately 50 percent of its market value was void for lack of a fair consideration. Here, Mitchell paid slightly more than 50 percent (57.7%) for the property involved. The sale, however, deprived the bankruptcy estate of an equity in the property of $84,600.00, if computed on the $200,000.00 market value fixed by the district court.

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has

approved the transfer for less than 70 percent of the market value of the property.

Assuming, arguendo, that we should review the district court's conclusion of law as a finding of fact under the "clearly erroneous" standard, the results would be the same. We cannot affirm the district court on this issue. Our review of the entire evidence leaves us with a definite and firm conviction that the price which Mitchell paid for the property at the trustee's sale was not a "fair equivalent" for the property. Under such circumstances, it is our duty to declare the transfer voidable under section 67(d). See, United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542,

92 L.ed. 746, 766 (1948); George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc., 502 F.2d 1045, 1049 (5th Cir. 1974). See also, Tulia Feedlot, Inc. v. United States, 513 F.2d 800, 807 (5th Cir., cert. denied, 423 U.S. 947, 96 S.Ct. 362, 46 L.ed.2d 281 (1975); Ealy v. Littlejohn, supra at 229 n. 30.

The defendant-appellee Mitchell seeks to sustain the final judgment of the district court on the ground that the transfer accomplished by the trustee pursuant to the power of sale provision of the deed of trust was not a transfer made by the debtor in possession within the contemplation of section 67(d). We find this position to be without merit.

The word "transfer" is defined in section 1 of the Act, 11 U.S.C. §1. Section 1 provides in pertinent part:

> The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> (30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or

> involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

[2] The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in

possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year

period provided by section 67(d)(2), 11 U.S.C. §107(d)(2). This conclusion is supported by reliable and ample authority. See 1 Collier on Bankruptcy, §1.30 at 130.28(2)(3) (14th ed. 1967), where it is said: "[t]he present definition covers not only alienations of title but includes surrender of possession". See also, 4 Collier on Bankruptcy, §67.29 at 471, et seq.

For the reasons herein given, the judgment of the district court must be vacated, and the cause reversed with directions.

Upon remand, the district court shall enter judgment for plaintiff-appellant, directing the rescission of the transfer under section 67(d) of the Act, dealing

with the property in such manner as will protect Mitchell's equity therein. Section 67(d)(6), 11 U.S.C. §107(d)(6).

JUDGMENT VACATED; REMANDED WITH DIRECTIONS.

APPENDIX D

HAROLD C. ABRAMSON, Trustee,
Plaintiff-Appellant,

v.

LAKEWOOD BANK AND TRUST COMPANY,
Defendant-Appellee.

No. 79-1592

United States Court of Appeals,
Fifth Circuit

June 10, 1981.

Trustee in bankruptcy brought suit to have foreclosure sale declared a fraudulent transfer under Bankruptcy Act. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., granted summary judgment for bank and refused to set aside alleged transfer, and trustee appealed. The Court of Appeals held that bank's nonjudicial foreclosure sale was a

"transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Reversed and remanded.

Thomas A. Clark, Circuit Judge, dissented and filed opinion.

Bankruptcy 165(3.2)

Bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Bankr. Act, §§1(30), 67(d)(2), 11 U.S.C.A.§§1(30), 107(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

Philip I. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Storey, Armstrong, Steger & Martin, William L. Bedard, Dallas, Tex. for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an appeal by Harold C. Abramson, acting as trustee in bankruptcy

under Chapter XI of the old Bankruptcy Act, [1] former 11 U.S.C. §1, et seq., of

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[1] The foreclosure sale of the property under attack here occurred August 3, 1976. Appellant filed a petition under Chapter XI of the Bankruptcy Act on February 24, 1977. Sec. 403(a) of Pub.L. No. 95-598, Title I (Nov. 6, 1978), 92 Stat. 2549 provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Since the events giving rise to this lawsuit occurred before the effective date of the new Bankruptcy Act the rights of the parties herein are governed by

the district court's order refusing to set aside an alleged transfer of real property within one year of the filing of debtor's bankruptcy petition. The district court granted summary judgment for the defendant-appellee, Lakewood Bank and Trust Company ("Lakewood Bank"), holding that the nonjudicial foreclosure sale of the debtor's land did not constitute a "transfer" within the meaning of §67(d) of the Bankruptcy Act. We reverse.

The facts can be stated briefly. The appellant, Abramson, brought this action in his capacity as court appointed trustee in the bankruptcy of Frank L. Johnson and

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"repealed Title XI." When reference is made in this opinion to the "Act" or the "Bankruptcy Act" this same shall refer to "repealed Title XI."

Nina P. Johnson. The appellee, Lakewood Bank, is a Dallas bank. The bankrupts owned seventy-three acres of land in Kaufman County, Texas. In August of 1975, the bankrupts borrowed $74,000 on an installment loan. This loan was secured by a conventional deed of trust in favor of the bank on the seventy-three acres.

The deed of trust was recorded by the bank on August 5, 1975. When the bankrupts were unable to fulfill their financial obligations to the Lakewood Bank, a foreclosure sale was held on August 3, 1976, at which time the Lakewood Bank, through its agent Louis McClain, purchased the property for $65,000 cash. At the time of the foreclosure sale, the bankrupts owed approximately $71,000 on

the mortgage. On February 24, 1977, the Johnsons filed a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas.

The Trustee brought this action in March, 1978, to have the August, 1976, foreclosure sale declared a fraudulent transfer under §67(d) of the Bankruptcy Act. While the deed of trust had been executed more than one year prior to the date of the filing of the bankruptcy petition, the actual foreclosure sale occurred less than seven months before the filing. Section 67(d)(2) provided that "[e]very transfer made and every obligation incurred by a debtor within one year prior to the filing" of the

bankruptcy petition "is fraudulent. . . as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." 11 U.S.C. §107(d)(2) (1966) (current version at 11 U.S.C. §548(a) (1978)) (emphasis supplied).

In granting summary judgment for the Lakewood Bank, the district court held that for purposes of the Bankruptcy Act, there was only one "transfer" in this case and that it "occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy."

More than a year after the issuance of the district court's ruling in the

Abramson case, this court of appeals decided the remarkably similar case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). As to the narrow issue before us on this appeal, i.e., whether the bank's non-judicial foreclosure sale constitutes a "transfer" within the meaning of the Act, we consider the holding in Durrett as controlling.

The word "transfer" was defined in Section 1 of the Act as including:

> the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or

> conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

11 U.S.C. §1(30).[2]

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[2] The current version of the definition of transfer is located at 11 U.S.C §101(40):

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

In Durrett, this court held that a Texas non-judicial foreclosure sale constituted a transfer within the meaning of §67(d). There, a deed of trust to secure debt had been executed in 1969. In January, 1977, some nine days prior to the debtor's filing for bankruptcy, the trustee in the deed of trust sold the property at a non-judicial foreclosure sale as authorized by the deed of trust and Texas law. The debtor in possession under Chapter XI of the Bankruptcy Act brought a suit to set aside the sale of the property as a voidable transfer.

In considering whether the foreclosure sale was a "transfer" made by the debtor in possession, a panel of this

court set forth the definition of "transfer" and wrote:

> The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to

> Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. §107(d)(2).

Durrett v. Washington National Insurance Co., 621 F.2d at 204.

Accordingly, the foreclosure sale of the Johnsons' seventy-three acres was also a transfer within the meaning of the Act. As this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration. Therefore we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

THOMAS A. CLARK, Circuit Judge, dissenting:

I dissent. Although I recognize our panel is bound by Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), Durrett is simply wrong in its holding that a foreclosure sale is a

transfer within the meaning of §67(d). Subparagraph (2) of that section of the former Bankruptcy Act reads in part as follows:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent. . . if made or incurred without fair consideration by a debtor. . . without regard to his actual intent;. . .

11 U.S.C. §107(d)(2).

A foreclosure sale by a mortgagee or trustee is not a transfer by the debtor, although done in his name pursuant to a power of sale in the mortgage or deed of

trust. The debtor's act which triggers foreclosure is the failure to fulfill some obligation in the promissory note which is secured by the mortgage or deed of trust. The creditor than declares the obligation due, forecloses, and sells at a public sale to the highest bidder. The mortgagor-trustor/bankrupt does nothing but default--that cannot be translated into a "transfer." It is not a voluntary conveyance on his part. The power of sale vested in the mortgagee or trustee, when coupled with an interest as here, is a valuable property right acquired by that party at the time of the execution of the

initial mortgage or trust deed.[1] When that time is more than twelve months before the filing of the bankruptcy petition, the power of sale is vested absolutely in the mortgagee or trustee.

It is basic mortgage law that at the time of the foreclosure sale the purchaser (who may or may not be the mortgagee or trustee) takes the same title to the property which the mortgagor or trustor had at the time of the initial mortgage or

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[1] Technically a mortgage does not contain a power of sale, while a deed of trust or deed to secure debt does contain such a power. However, in common parlance the generic term "mortgage" embraces all forms of instruments creating a lien on realty for the purpose of securing a debt. Many contain powers of sale in order to avoid court proceedings which are necessary in strict mortgage states.

trust deed, subject only to property taxes (and perhaps some statutory intervening limitations as changes in zoning, etc., and the right of redemption by the mortgagee with a specified number of days granted statutorily in some states), and free and clear of any intervening liens or mortgages placed against the property by the debtor or any judgment creditor.

By our decision here and in Durrett we cast a cloud upon mortgages and trust deeds. Foreclosure within twelve months before a filing creates a sale voidable by the trustee in bankruptcy if the public sale did not bring a "fair consideration." It is generally known that such sales do not bring the best price, but most states, including Texas, mandate public sales when

foreclosure is the creditor's remedy. Many states, but not Texas, prohibit a deficiency judgment against the debtor unless the mortgagee obtains confirmation of the sale through a court proceeding where the fairness of the consideration is adjudicated.[2] Thus in those states a mortgagee who did not obtain judicial confirmation would be prohibited from filing a claim in the bankruptcy proceeding for the amount of the deficiency.

The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy

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[2] See, e.g., Ga. Code Ann. §67-1503 (confirmation of foreclosure sales under powers).

trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure in all six states comprising this circuit.

It is interesting to me that Durrett is the first case treating this problem--after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion.

I would affirm.